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No. 95-1539

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

J. PATRICK KITTLER and LINDA ALT KITTLER,

Petitioners,

vs.

ECKBERG, LAMMERS, BRIGGS, WOLFF & VIERLING; KEVIN K. SHOEBERG, ESQ. and JON PEDERSON, individually,

Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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Appendix A — Letter Dated January 25, 1996 ..... 1a

Respondents Kevin Shoeberg ("Shoeberg"), Eckberg, Lammers, Briggs, Wolff and Vierling, and Jon Pederson respectfully request that the Court deny J. Patrick Kittler's and Linda Alt Kittler's Petition for Writ of Certiorari seeking review of the decision of the Minnesota Court of Appeals. The Minnesota Court of Appeals' opinion is reported at 535 N.W.2d 653 (Minn. Ct. App. 1995) (Petition for Rev. denied, October 10, 1995).

STATEMENT OF THE CASE

Petitioners J. Patrick Kittler and Linda Alt Kittler commenced this defamation action in state court on or about April 2, 1993. In their Complaint, petitioners alleged that they were defamed by respondent Kevin Shoeberg, Esq. ("Shoeberg"), who, while representing several clients including respondent Pederson, mailed a letter to former shareholders of the Ronde Corporation advising them of potential litigation and seeking their participation therein. (Petitioners' Appendix at 14.)

On November 17, 1993, respondents brought a motion for summary judgment before the Honorable Michael Davis. In respondent Shoeberg's motion, he argued that the statements contained in the letter were absolutely privileged pursuant to the Minnesota common law doctrine of absolute judicial privilege. Respondent Shoeberg also argued that the statements were protected by a qualified privilege. Finally, respondent Shoeberg argued that this action was prohibited as a matter of law pursuant to Minnesota public policy prohibiting actions against attorneys by third parties where such actions would require the disclosure of information protected by the attorney-client privilege.

Judge Davis ruled on respondent Shoeberg's motion for summary judgment in an Order dated February 7, 1994. (Petitioners' Appendix at 35.) In the Memorandum attached to

the Order, Judge Davis concluded that Minnesota courts had adopted the absolute judicial privilege set out in the Restatement (Second) of Torts § 586 and that this judicial immunity applied in this case. (Petitioners' Appendix at 39 and 40.) Section 586 of the Restatement (Second) of Torts provides:

> An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it had some relation thereto.

Judge Davis went on to note that Comment e to Restatement (Second) of Torts § 586 provided the appropriate test in determining whether the absolute judicial privilege applied to communications made by an attorney preliminary to a proposed judicial proceeding. That Comment provides:

> As to communications preliminary to a proposed judicial proceeding, the rule stated in this section applies only when the communication has some relation to the proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

Restatement (Second) of Torts, § 586 (Cmt. e).

Judge Davis concluded that the first element of the test had

been satisfied in that the letter notified potential clients of proposed litigation and of allegations that would affect their rights as former shareholders of the Ronde/First Merchant Corporation. (Petitioners' Appendix at 41.) Judge David found, however, that there was an insufficient factual record to determine "whether such a proceeding is, or was, contemplated in good faith." (*Id.*). Accordingly, Judge Davis granted petitioners' motion for a continuance pursuant to Minn. R. Civ. P. 56.06 to allow petitioners the opportunity to discover the factual basis for the allegations contained in the letter and attempt to discover evidence that the action was not contemplated in good faith. (Petitioners' Appendix at 42.) With respect to the issue of qualified privilege, Judge Davis found that the record was insufficient to allow him to determine whether any evidence of malice existed. (*Id.*). Judge Davis did not rule on respondents' argument that this action was prohibited on public policy grounds.

After allowing the petitioners to complete their discovery, respondents renewed their motion for summary judgment. On September 28, 1994, respondents' renewed motion for summary judgment was heard by the Honorable Steven Z. Lange. Again, respondents argued that the letter was protected by Minnesota's absolute judicial privilege, was subject to a qualified privilege, and that petitioners' action was prohibited as a matter of law pursuant to Minnesota public policy. In his Order dated November 15, 1994, Judge Lange granted respondents' motion for summary judgment. In so doing, Judge Lange agreed with Judge Davis that the absolute judicial privilege set forth in the Restatement (Second) of Torts § 586, which had been adopted as Minnesota law, applied to the facts of this case. (Petitioners' Appendix at 27 and 28.) Given Judge Davis' finding that the letter was related to the proposed proceeding, the only issue before Judge Lange was whether the action was seriously contemplated by Shoeberg when the letter was sent. On that

issue, Judge Lange found that there was "substantial evidence in the file that [respondent] did, in fact, intend to file a suit against [petitioners]." (Petitioners' Appendix at 30.) Thus, Judge Lange held that the letter at issue was protected by the absolute judicial privilege. (Petitioners' Appendix at 30-31.)

With respect to respondents' arguments that the statement was protected by a common law qualified privilege, Judge Lange ruled that he need not reach that issue in light of his ruling that the subject letter was protected by an absolute privilege. (Petitioners' Appendix at 32.) Finally, with respect to respondents' argument that petitioners' action was prohibited by Minnesota public policy, Judge Lange found that the public policy concerns "clearly supported" his decision. (Petitioners' Appendix at 33.) Judge Lange stated that petitioners' lawsuit "is essentially a preemptive strike designed to prevent [respondents] from pursuing the underlying action by creating a conflict of interest between Pederson and his attorney." (Petitioners' Appendix at 33.)

On March 13, 1995, petitioners appealed the trial court's grant of summary judgment to the Minnesota Court of Appeals. On appeal, the petitioners raised a new argument as to why summary judgment was inappropriate. The petitioners argued that Shoeberg's letter was simply a solicitation and, therefore, not protected by the absolute privilege. The Minnesota Court of Appeals rejected petitioners' argument and affirmed the trial court's grant of summary judgment. (Petitioners' Appendix at 3.) In so doing, the Court relied on the Restatement (Second) of Torts, § 586, adopted as the law of Minnesota in *Matthis v. Kennedy*, 243 Minn. 219, 228, 67 N.W.2d 413, 419 (1954), in holding that the letter was protected by the absolute judicial privilege. (Petitioners' Appendix at 6-7.) The Minnesota Court of Appeals noted that petitioners offered no support for their view that a letter soliciting potential plaintiffs and a

communication preliminary to a proposed judicial proceeding are mutually exclusive. (Petitioners' Appendix at 9.) The Minnesota Court of Appeals also noted the existence of significant policy arguants favoring extension of the judicial privilege to acts which both solicit and communicate. The Minnesota Court of Appeals noted:

> The better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded.

(Petitioners' Appendix at 12.)

On or about September 7, 1995, petitioners served and filed a Petition for Review to the Minnesota Supreme Court. (Petitioners' Appendix at 49.) On October 10, 1995, petitioners' Petition for Further Review was denied. (Petitioners' Appendix at 2.)

On October 19, 1995, petitioners sent an ex parte letter to the Honorable A. M. Keith, Chief Justice of the Minnesota Supreme Court, requesting a reconsideration of the Minnesota Supreme Court's denial of their Petition for Further Review. (Petitioners' Appendix at 45.) On October 25, 1995, the Minnesota Supreme Court denied petitioners' request for reconsideration of the denial of their Petition for Further Review. (Petitioners' Appendix at 1.)

On January 22, 1996, petitioners served and filed their Petition for Writ of Certiorari alleging federal question jurisdiction based upon their contention that judicial privilege is unconstitutional. Pursuant to a letter dated January 25, 1996, the Clerk of the Supreme Court returned the Petition to the petitioners to correct several technical defects. (Respondents' Appendix at 1.) The Clerk of the Supreme Court advised petitioners that they had 60 days in which to correct the defects and refile their Brief.

On March 25, 1996, petitioners reserved and refiled their Petition for Writ of Certiorari. In addition to correcting the technical defects in their Petition, petitioners also substantively revised and edited their Petition.[1]

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

A. The Petition Does Not Raise A Substantial Federal Question For This Court To Review.

Petitioners assert that this Court has jurisdiction to review this matter because the decision of the Minnesota Courts has raised a substantial federal question. Specifically, petitioners contend that the Minnesota Courts have violated the Due Process

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1. Respondents request that the Court strike those portions of the refiled Petition which were edited and supplemented. The sixty day allowance provided by the Clerk of the Supreme Court was to allow petitioners to correct the technical defects in their Petition. The extension was not to provide petitioners with additional time to revise and supplement the substance of their Petition.

Clause of the Fourteenth Amendment by holding that the common law doctrine of judicial privilege bars petitioners' claim. The only federal question raised in the Petition is whether recognition and application of the judicial privilege by the Minnesota Courts is unconstitutional. This Court has held that the recognition and application of such an immunity principle does not violate the Due Process Clause. Accordingly, there is no substantial federal question upon which petitioners can rely in seeking a Writ of Certiorari.

1. *The Decision Of The Minnesota Courts Does Not Deprive Petitioners Of Procedural Due Process.*

Petitioners contend that the Minnesota Courts have deprived them of their right to access to the courts without due process of law. (Petition at p. 1). Specifically, petitioners claim that by recognizing the absolute judicial privilege, the Minnesota Courts have unconstitutionally deprived them of their right to obtain a monetary recovery for an alleged injury to their reputations without procedural due process. Even if petitioners could establish a liberty or property interest in their reputations, they have been afforded substantial procedural due process. Petitioners have been able to argue the merits of their claim through all levels of the Minnesota state courts. Thus, petitioners' claim that they have been denied access to the Minnesota Courts is without merit.

This Court has held that if a State makes access to the courts an entitlement or a necessity, the state may not deprive an individual of that access without a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The Due Process Clause does not require a hearing on the merits of the claim, but simply an opportunity to be heard at a meaningful time in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

In this case, petitioners have not been denied access to the Minnesota courts. Quite to the contrary, petitioners have been allowed to commence this lawsuit, engage in full discovery, respond to several motions for summary judgment on the merits, and exercise their appellate rights. Petitioners were afforded, and they exercised, every right to process permitted under Minnesota law. Petitioners protest, however, that they have been denied a right to present their claims to a jury. The Due Process Clause of the Fourteenth Amendment, however, does not require that every individual who believes that they have been injured by tortious conduct have the right to a jury trial in all instances. Although petitioners argued a loss of procedural due process, this argument should really address substantive due process because petitioners object to a defense available to their claim — not court access. Accordingly, since petitioners were not deprived of procedural due process, they have not established any substantial federal question to support this Petition.

2. *The Decisions Of The Minnesota Courts Do Not Deprive Petitioners Of Substantive Due Process.*

This Court has long held that when a State creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless that law is in conflict with federal law. *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979); *Martinez v. California*, 444 U.S. 277, 282 n. 5 (1980) (State immunity defense, like an element of the tort claim, is merely an aspect of the State's definition of the property interest). Accordingly, when a State establishes an immunity defense to a tort claim, that defense does not violate the Due Process Clause simply because it operates to defeat a tort claim. *Daniels v. Williams*, 474 U.S. 327, 341 n. 20 (1986); *Martinez v. California*, 444 U.S. at 281-82 (1979). This Court has stated that:

> Even if one characterizes the immunity defense as a statutory deprivation, it would

> remain true that the State's own interest in fashioning its own rules of tort law are paramount to any discernable Federal interest, except perhaps an interest in protecting the individual citizen from State action that is wholly arbitrary or irrational.

Martinez v. California, 444 U.S. at 282.

In the present matter before the Court, Minnesota courts have adopted a common law judicial privilege to bar certain defamation claims. The recognition and application of such an immunity doctrine does not violate substantive due process.

On numerous occasions, this Court has reviewed the doctrine of judicial immunity. This Court has observed that "few doctrines were more solidly established at common law" than judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). This Court has specifically adopted and followed the common law doctrine of judicial immunity for more than a century. *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872). Despite the fact that this Court has repeatedly and consistently applied this doctrine, petitioners herein contend that the recognition of judicial immunity and its application to bar certain tort claims is unconstitutional because it leaves no remedy for their alleged injury. This Court has never held in any of the judicial immunity cases it has reviewed that substantive or procedural due process issues were implicated. Quite to the contrary, these cases clearly imply that judicial immunity is constitutionally permissible, and does not violate an individual's due process rights.

B. The Federal Question Asserted In The Petition Was Not Raised Below.

This Court refuses to review judgments rendered by the highest state court unless the federal question posed in the petition was both raised and decided in the courts below. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the court will refuse to consider federal questions that were not raised or addressed below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

In this Court, for the first time, petitioners raise the claim that the Minnesota Courts' application of the common law judicial privilege is a violation of the Due Process Clause of the Fourteenth Amendment. This claim was never raised before any of the Minnesota Courts. Petitioners contend that they did raise the federal question in the Petition for Further Review to the Minnesota Supreme Court by stating that their arguments were "based upon policies relating to Constitutional jurisprudence and judicial administration." (Petition at p. 13; Petitioners' Appendix at 54). This Court has held that such unspecific references to a federal question are insufficient to allow this Court to review the matter. *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935) (reference to the "Constitution of the United States" to the courts below is insufficient to raise a federal question); *Brady v. Maryland*, 373 U.S. 83, 91 (1963) (reference to "due process of law" below insufficient to raise a federal question). The petitioners never cited the Fourteenth Amendment to the trial court, the Minnesota Court of Appeals, or the Minnesota Supreme Court as a basis for denying the motion for summary judgment. Accordingly, because none of these alleged constitutional violations were raised or addressed by the courts below, this Court should consider the issue waived and refuse to consider that question for the first time here.

II.

THE MINNESOTA COURTS CORRECTLY APPLIED THE STATE COMMON LAW DOCTRINE OF JUDICIAL PRIVILEGE.

The majority of the Petition to this Court concerns itself with perceived errors by the Minnesota courts in applying the state common law doctrine of judicial privilege to this case. Petitioners disagree with how the Minnesota courts have interpreted and applied state common law in this matter. It is not the role of this Court, however, to review a state court decision based purely on state law principles. *International Long Shoremen's Assoc., AFL-CIO v. Davis*, 476 U.S. 380 (1986) (Supreme Court has no authority to review state determinations of purely state law); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (Supreme Court will not review state court decision which is clearly based on state law). Accordingly, the Petition should be denied.

Minnesota law has long held that statements made in the course of judicial proceedings are absolutely privileged. *Matthis v. Kennedy*, 243 Minn. 219, 67 N.W.2d 413, 416-17 (Minn. 1954); *Freier v. Independent School District No. 197*, 356 N.W.2d 724, 728 (Minn. Ct. App. 1984). Minnesota law does not limit the application of the privilege to statements made during trial or before a judge, but extends its protection through statements made by an attorney preliminary to a proposed judicial proceeding. *Matthis v. Kennedy*, 67 N.W. 2d at 419 (adopted Restatement of Torts § 586); *Pinto v. Internationale Set, Inc.*, 650 F. Supp. 306, 308 (D. Minn. 1986) (interpreting Minnesota law); Restatement (Second) of Torts § 586. Minnesota law provides that if a statement is protected by the absolute privilege, the immunity is "total and absolute." *Freier v. Independent School District No. 197*, 356 N.W. 2d at 729.

Under Minnesota law, a communication by an attorney preliminary to a proposed judicial proceeding will be absolutely privileged if (1) the statement has some relation to the proposed proceeding; and (2) the proposed litigation is contemplated in good and under serious consideration. Restatement (Second) of Torts § 586, Cmt. e.

In this matter, the Minnesota courts have unanimously concluded that the allegedly defamatory statement made by Shoeberg was privileged pursuant to Minnesota law. In the Petition herein, however, petitioners are critical of the Minnesota courts' interpretation and application of its common law doctrine of absolute judicial privilege. Petitioners contend that Minnesota courts should narrowly construe the doctrine. (Petition at p. 12.) Petitioners also contend that Minnesota courts should limit the application, as some other jurisdictions have done, to statements made during a judicial proceeding, to statements made by an attorney "in office," and to statements made in furtherance of the judicial proceeding. (*Id.*). Petitioners also cite to other jurisdictions which apply the judicial privilege differently than Minnesota courts choose to do. (Petition at pp. 16-17.) Petitioners presented all of these arguments to the Minnesota courts. The Minnesota courts, however, did not adopt petitioners' analysis or conclusions. Petitioners now ask this Court to review the Minnesota courts' decision regarding the application of the Minnesota common law doctrine of judicial privilege. The role of this Court is not to determine whether a state court correctly interpreted or applied a state common law principle. *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (it is a fundamental principle that the Court is not free to substitute its interpretation of state law for that of a state court's); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, No. 8 (1930) ("Since it is for state courts to interpret and declare the law of the state, it is for them to correct their errors and declare what the law has been as well as what it is"). It is not the function of this Court

to sit as a super-appellate court to review matters of state policy and application of state law. This matter simply involves the application of a state common law doctrine by state courts to a state common law claim of defamation. No federal question is involved, and this Court, therefore, need not involve itself in this dispute.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — LETTER DATED JANUARY 25, 1996

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

January 25, 1996

Richard A. Williams Jr.
Suite 450
100 So. 5th Street
Minneapolis, MN 55402

RE: J. Patrick Kittler, et ux. v. Eckberg, Lammers, Br

Dear Mr. Williams:

Returned are 39 of the 40 copies of a petition for a writ of certiorari in the above-entitled case postmarked on January 22, 1996 and received on January 24, 1996, which fails to comply with the Rules of this Court.

Rule 33.1(c) prohibits the use of spiral, plastic, metal or string bindings. Staples may be used, at least two, along the left margin covered with tape.

Your name, address and telephone number must appear on the bottom of the cover of the petition, as well as at the conclusion of the petition, before the appendix. Please see the sample cover on the back of the enclosed memorandum for those intending to prepare a petition and pay the docket fee.

Appendix A

The table of authorities must follow the table of contents. Rule 14.

The documents in the appendix must in the order set forth in Rule 14.

The fee for docketing a petition for a writ of certiorari is $300.

Kindly redo the petition and appendix so that it complies in all respects with the Rules of the Court and return it to this office promptly so that it may be docketed. Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

Enclosed is a copy of the Rules of the Court and memorandum concerning the preparation of a petition.

Sincerely,
William K. Suter, Clerk
By:

Ruth Jones
(202) 479-3022

Enclosures
cc: Bryan G. Ascheman
Jonathan Saffold, Jr.

(3)

95-1539

Docket No.

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IN THE
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J. PATRICK KITTLER
and LINDA ALT KITTLER,

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v.

ECKBERG, LAMMERS, BRIGGS,
WOLFF & VIERLING;
KEVIN K. SHOEBERG, ESQ.;
and JON PEDERSON, individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MINNESOTA COURT OF APPEALS

PETITIONERS' REPLY MEMORANDUM

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Petitoners respectfully submit their reply to the Respondents Brief in Opposition to their Petition for a Writ of Certiorari.

Respondents, argue that the decision below rests upon independent and adequate state grounds. (Respondent, p.11) The issue is whether such grounds, as applied, can withstand Constitutional scrutiny. Respondents admit that when applying this privilege to solicitation, Minnesota conflicts with other jurisdictions concerning whether, or not, an attorney is "in office." They also admit conflict with respect to other tests. (Respondents, p 12) Petitioners argue, and argued in the courts below, that Minnesota is in conflict with all of the states and all but one of the federal appellate courts that have addressed the issues properly before this Court. (Petition 11, 16, 17, 19) McKenna v Champion International Corp., 747 F2d 1211 (CA 8 1984) reviews many of the Federal Supreme Court and Appeals court cases. After concluding that there, as here, putative plaintiffs do not suffer a denial of due process if they do not receive notice of the pending litigation, the McKenna court focused discipline in relation to invitations to join a law suit, the lack of legislative guidance and the issue of solicitation.

> **A notice prepared and sent by an attorney to prospective class members serves primarily to procure remunerative employment. Accordingly we analyze the attorney's right to send notice as commercial speech. Id at 1214, citing In re R.M.J., 455 U.S. 191 (1982) and Bates v State Bar of Arizona, 433 U.S. 350 (1977)**

Respondents misstate the record in several places concerning issues properly before the Court.

In their Statement of the Case, at page 3, respondents state that "Judge Davis did not rule on respondents' argument that (petitioners') action was prohibited on public policy grounds." The policy argument stated at page 1 was relied upon as an independent defense. Judge Davis cited this Court and the Eighth Circuit. (Petition, Ap. p. 41) He ruled that neither the First Amendment nor public policy prevents petitioners' suit or discovery of the facts upon which respondents relied when they alleged fraud, theft, misrepresentation and breach of fiduciary duty when they solicited the shareholders of the company Mr. Kittler had managed. (Petition, pp 3-4, AP. pp 38, 41, 83)

At pages 2 and 3, respondents state that Judge Davis concluded that the absolute judicial privilege applies in this case. Judge Davis only found that "...the letter written by Kevin Shoeberg <u>may be</u> protected..."(emphasis added) (Petition, Ap. p.41) and that the authority offered to him by respondents:

(1) requires, that the "...statements (be) made "in Office" in the character of ... counsel-in (sic) the performance of a public duty or the exercise of a private right upon which immunity is based" (Id. Ap. 39);

(2) justifies the privilege for attorneys when fulfilling their function as "officers of the court", (Id., Ap. p. 40), and

(3) requires that the respondents provide a factual basis to prove that the litigation was contemplated in good faith (Id. Ap. p. 41, 42).

Judge Davis (Id. Ap. pp. 36, 41-42) He did not limit discovery. He did not find that Respondent Shoeberg met the functional and policy tests of the privilege and ordered discovery. Discovery produced only additional evidence of lack of good faith and admissions by respondent Shoeberg that he would not "participate as counsel" until he was paid to investigate the facts. (Petition, p. 6) Therefore, petitioners relied on Judge Davis' reading of the necessary pre-conditions and extensive Minnesota and Restatement authority requiring that the issue of sufficiency of factual support be submitted to a jury. (Petition, Ap. pp. 81, 82) Being surprised at the result before Judge Lange, petitioners moved to the Court of appeals and renewed their arguments that solicitation is not judicial action and in any case must be truthful to raise a fundamental right under the First Amendment. (Petition, Ap. p.62-70)

On page 4, respondents state that petitioners raised the argument that Shoeberg's letter "...was simply a solicitation and therefore not protected.." for the first time in the Court of Appeals. In fact, Petitioners posed the issue from the outset (Petition Ap. p. 39, 86, 90-93), cited what they reasonably believed was established and controlling Minnesota law and persuasive sister state authority (Id.,pp. 2-3), and argued that Respondent Shoeberg's solicitation was "...not privileged because the statements were made outside the context of a judicial proceeding..." (Petition, Ap p.39)

Respondents argue that: In this case, petitioners have not been denied access to the Minnesota courts.... (Res. Brief in Opp. p 8)

Petitioners have argued the merit of applying the judicial privilege to a solicitation. However, they have been denied access to adjudicate the questions of defamation, malice and damage. The cases cited by respondents hold that this Court will examine the denial of adjudication as a denial of a fundamental due process right, Logan v Zimmerman, 455 U.S. 422 (1982)(Denial of adjudication is denial of a property right under the Federal Constitution); Armstrong v Manzo, 380 U. S. 545 (1965)(Failure to give notice of hearing cannot be supported by a self-serving statement of an interested party; Bodie v Connecticut, 401 U. S. 371 (1971) (Automatic denial of adjudication for inability to pay fees raised question of equal protection.).

Similarly the cases cited by the respondents as holding that the state is free to define the defenses to claims of tortious harm all support the position that whether the actor was acting "in office" is an important Constitutional issue and whether the creation of those defenses has resulted in a denial of a fundamental right under the Constitution is a question which is subject to review by this Court, Ferri v Ackerman 444 U.S. 193, 198 (1979), Martinez v California, 444 U.S. 277 (1980); Daniels v Williams, 474 U. S. 327 ; Pierson v Ray 386 U.S. 547 (1967) and Bradley v Fisher, 13 Wall 335, 20 L.Ed. 646 (1872); Cleavinger v Saxner, 474 U.S. 193(1985).

Respondents claim that the federal question asserted in the petition was not raised below because the petitioners never specifically cited the Fourteenth Amendment.

Neither the federal rules of civil or appellate procedure, 28 U. S. C., nor the Minnesota state rules of 48 M. S. C. and 51 M. S. C. place the uninitiated on notice that there is a hard and fast requirement of notice by reference to specific provisions of the U. S. Constitution, and there is not.

> **"A federal claim first raised by petition for rehearing in a state court is in time for purposes of review (in the U. S. Supreme Court) if it was raised at the first opportunity, even though the petition was denied without opinion." Brinkerhoff-Faris Trust & Savings Company v Hill, 281 U.S. 673 (1930), see also Konigsberg v State Bar of California, 353 U.S. 252, 254-258 (1957)**

"The statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Rules of the Supreme Court of the United States, Rule 14 (1) (a). See also 28 U.S.C. 2106, which authorizes the Court, with respect to any court's judgement lawfully brought before it for review, to affirm, modify, vacate, set aside, reverse, "or require such further proceedings to be had as may be just under the circumstances." See also 51 M.S.C. Rule 103.04

This case starts with the respondents' rights to commercial free speech and expression of opinion under the First Amendment. All other Constitutional issues in this case derive from this one. Respondents relied upon the attorney's right to commercial free speech when they wrote their letter. Without it there would be no question of privilege in this case, no question of their right to

express their opinion and no occasion for the courts below to deprive petitioners of access to adjudication for purposes of trying the issues of defamation and damages. The expression of opinion issue was raised by the respondents under the First Amendment in their first motion for summary judgement. (Petition, Ap. pp 42-44)

The commercial free speech issues of truthfulness as a precondition to the right(Petition, Ap. pp.47, 56, 62-66, 73), the attorney's standing when soliciting business (Id., pp. 47, 57, 62, 66, 68-70, 74) and the subsidiary issues of denial of access to adjudicate (Id., pp. 58, 46, 47) and equal protection (Id. pp. 46, 47, 55, 56, 57, 59) were timely raised by the petitioners in the Court of Appeals. (Petition, Ap. pp. 62-74) and pressed further by petition to the Minnesota Supreme Court. By citing the courts below to the First Amendment (Petition, Ap.p. 63, 64, 66, 73) and arguing specific authority from this Court and federal appeals courts involving relevant issues under the First and relevant subsidiary issues under Fourteenth Amendment petitioners gave timely notice to the courts below.(Petition, Ap. pp. 45-48, 54-59, 62-70) By consistently arguing that the rule of judicial privilege as it was applied to this case failed to involve reasonable Constitutional standards for its application under the U. S. Supreme Court and federal appeals court cases cited, the petitioners raised the Federal due process and equal protection questions inherent in the case. Id.

The state courts' determination that it would apply the rule of privileged immunity to the facts of this case involved a determination of the federal question issues. Konegsberg v State Bar of California, 353 U.S. 252, 254-258 (1957) (Where the state court has made a